Honorable O. P. Lockhart, Chairman
Board of Insurance Commissioners
Austin, Texas

Dear Sir:

Opinion No. 0-3387
Re: Insurance - Mutual assessment companies - Increase of rates - Reduction of benefits

Your request for opinion has been received and carefully considered. We quote from your request as follows:

"Section 17 of Senate Bill 135, passed by the Forty-sixth Legislature, reads as follows;

"'Payments on Certificates Already in Force. If the payments of the members of any association coming within the scope of this Act, on certificates issued and in force when this Act takes effect, or the reinsurance or renewals of such certificates, shall prove insufficient to pay matured death and disability claims in the maximum amount stated in such policies or certificates, and to provide for the creation and maintenance of the funds required by its laws, such association may with the approval of the Board of Insurance Commissioners and after proper hearing before said Board provide for meeting such deficiency by additional, increased or extra rates of payment, or by reduction in the maximum benefits stated in such policies or certificates then in force, or by both such increased payments and reduced maximum benefits, or the members may be given the option of agreeing to reduced maximum benefits, or of making increased payments.'

"After this law was in effect, several mutual assessment insurance companies subject to its provisions made application to the Board

to increase rates charged for their policies or to decrease policy benefits under Section 17. Cases in point are the Underwriters Life Insurance Company of Waco, which was authorized by the Board in its order, dated July 24, 1939, to increase rates; and the Provident Insurance Company of Dallas, which was authorized by the Board in its order, dated November 29, 1939, to revised benefits in certain policies. Copies of the orders are attached.

"Will you please advise if, in your opinion, the action taken by these companies in increasing rates and revising policy benefits under Section 17 of Senate Bill 135, following the Board's orders, was legal?"

Opinion No. 0-3763 of this department held Section 17 of Senate Bill 135, Acts of the 46th Legislature, unconstitutional. Because of the importance of the question, the matter was reconsidered by this department, and upon reconsideration we again held said Section 17 unconstitutional, in limited conference opinion No. 0-3763-A. Copies of these opinions have already been furnished you.

As pointed out in opinion No. 0-3763-A, the courts of Texas have recognized a clear distinction between the reduction of benefits and the increase of rates with reference to mutual assessment insurance companies. We quote from said opinion as follows:

"The raising of rates aside, we are bound by the law in Texas that the reduction of benefits in a mutual insurance contract constitutes an impairment of the obligations of such contract. In Supreme Council American Legion of Honor v. Batte, 79 S. W. 629, it was said:

"'In our opinion, however, the enactment of this by-law constituted a substantial repudiation of the contract. The benefit certificate upon its face provided for the payment of the sum of $5,000 out of the benefit fund of the order. The by-law was, in effect, an announcement that the appellant would only pay $2,000 out of the

> benefit fund, and would only pay the remaining $3,000 provided that amount could be paid out of the emergency fund of the order * * *. The by-law itself was, in our opinion, unauthorized, and appellee might have treated it as void * * *.'

"Wirtz v. Sovereign Camp, W. O. W., 268 S.W. 438, by a special Supreme Court, expressly recognized and reaffirmed the doctrine of the Batte case as follows:

> "'It does not appear to us that the Batte case, 34 Tex. Civ. App. 456, 79 S. W. 629, militates against what has been said above. That case did not directly involve the question of the right to increase rates; but the association had issued a policy upon which they had agreed to pay, upon the death of the insured, $5,000, but it subsequently changed the contract so as to make it liable for only $2,000, and the Court of Civil Appeals held -- and we think properly -- that there was a repudiation of the contract. * * *
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> "'That the stipulation or promise in a contract, such as is the basis of this action, that the insured will comply with and be bound by all future regulations or by-laws of the association, does not mean that the society may interfere with the essential purpose of the contract, viz., the payment of the indemnity promised, or, in other words, cannot be construed as authorizing the society to repudiate a plain contract is clearly settled there is no doubt. * * *'
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> "'The distinction between reducing by means of a by-law or an amendment the amount stipulated in the most unqualified terms to be paid, and merely increasing

> by a by-law dues or assessments to such extent as is necessary to meet the exigency ensuing out of the changed financial condition of the association brought about by decrease of membership by death or other causes, is obvious.
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> "'The first is a violation and repudiation of an unambiguous contract, while the other is not.'

"The doctrine of the Wirtz case was expressly recognized and reaffirmed in Supreme Lodge Ancient Order of Workmen v. Kemper, 155 S. W. (2d) 64, Rehearing denied October 8, 1941. Before quoting with approval the above quoted language in the Wirtz case, the Beaumont Court of Civil Appeals said:

> "'The law will enforce the contractual right of a life insurance corporation to increase the amount of its monthly assessments against its members. Supreme Lodge K. of P. v. Mims, Tex. Civ. App., 167 S. W. 835. But the right to increase assessments does not authorize the corporation to diminish the amount payable under its certificate. . .'

"Therefore, Section 17 of Senate Bill 135 in its express authorization to mutual insurance associations to reduce benefits authorizes the impairment of obligations of contract, is violative of Section 16, Article 1, of the Texas Constitution, and cannot, under the pronouncements of the Supreme Court of Texas, be upheld as a valid and constitutional exercise of the police power of this State."

We quote from the Wirtz case, supra, as follows:

"That the stipulation or promise in a contract such as is the basis of this action, that the insured will comply with and be bound by all future regulations or by laws of the association, does not mean that the society

> may interfere with the essential purpose of the contract, viz., the payment of the indemnity promised, or, in other words, cannot be construed as authorizing the society to repudiate a plain contract is clearly settled there is no doubt. Morton v. Supreme, etc., 100 Mo. App. 76, 73 S. W. 264, 79 S. W. 629; Ericson v. Supreme, etc., 105 Tex. 170, 146 S. W. 160.
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> "Such holding, however, is equally sound in law and in morals, but it is, however, also settled law that benevolent societies may increase their rates within reasonable limits in order to enable them to meet their obligations, and in doing so they violate no contract."

The right of a benevolent or a mutual assessment insurance association to increase its rates is, of course, limited to the extent that such increase must be reasonable and necessary. For example, in the case of Ericson v. Supreme Ruling of Fraternal Mystic Circle, 146 S. W. 160 (Supreme Court of Texas), where the assessment of a member was increased from $3.30 to $23.16 a month, without his consent, the Supreme Court held under the facts of that case that this was a repudiation of the contract and that the member was entitled to a judgment against the society for all assessments paid with interest.

In answer to your question, you are respectfully advised that it is the opinion of this department that since Section 17 of Senate Bill 135, 46th Legislature of Texas, is unconstitutional, orders of the Board of Insurance Commissioners based thereon are of no force and effect. It is our further opinion that mutual assessment insurance companies cannot legally reduce benefits promised its members in its policies without the consent of such members and policyholders. It is our further opinion that mutual assessment insurance companies have the right to increase their rates to the extent that they are reasonable and necessary. The question of reasonableness and necessity, of course, is a fact question to be determined by the facts in each case.

This opinion is not to be construed as specifically passing on the legality of the acts of the insurance companies named in your letter, in raising rates or reducing benefits, as we have not been furnished with copies of their policy contracts, nor have we been furnished information as to whether such reductions of benefits were made with the consent of the policy holders of the company, and we have not been informed whether the increased rates are reasonable and necessary. In other words, the legality or illegality of the acts of the insurance companies in raising rates or reducing benefits will not be determined by Section 17 of Senate Bill 135, but will be determined by the policy contracts in each case and by all the facts in each case.

Trusting that this satisfactorily answers your inquiry, we are

Very truly yours

ATTORNEY GENERAL OF TEXAS

By /signed/
Wm. J. Fanning
Assistant

WJF:GO

APPROVED DEC. 18, 1941
/s/ Grover Sellers
FIRST ASSISTANT ATTORNEY GENERAL

APPROVED OPINION COMMITTEE
By: /s/ B. W. B., Chairman